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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

RONALD E. MARTINDALE, U.S. NAVY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

CAN A WITNESS BE UNAVAILABLE FOR HEARSAY PURPOSES, BUT AVAILABLE FOR CONFRONTATION PURPOSES?

CAN A COURT CONSIDER CORROBORATING EVIDENCE IN DETERMINING THE RELIABILITY OF A HEARSAY STATEMENT UNDER A RESIDUAL EXCEPTION TO THE HEARSAY RULE WHEN CONFRONTATION IS NOT AT ISSUE?

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OPINIONS BELOW

The September 15, 1994 opinion of the United States Court of Military Appeals [hereinafter the C.M.A.][1], *United States v. Martindale*, 40 M.J. ___, (C.M.A. 1994), is reprinted as Appendix A.

The January 11, 1993 opinion of the Navy-Marine Corps Court of Military Review [hereinafter the

[1] The United States Court of Military Appeals has been renamed the United States Court of Appeals for the Armed Forces. All cases relevant to this petition were decided before the name change, so the original name of the court is used in this petition.

N.M.C.M.R.][2], *United States v. Martindale*, 36 M.J. 870 (N.M.C.M.R. 1993), is reprinted as Appendix B.

The September 19, 1990 order setting aside the July 12, 1990 decision of the C.M.A. and the January 6, 1989 decision of the N.M.C.M.R., and remanding the case to the N.M.C.M.R. for reconsideration, *United States v. Martindale*, 32 M.J. 33 (C.M.A. 1990) (summary disposition), is reprinted as Appendix C.

The July 12, 1990 decision of the C.M.A., *United States v. Martindale*, 30 M.J. 172 (C.M.A. 1990), is reprinted as Appendix D.

The January 6, 1989 decision of the N.M.C.M.R., *United States v. Martindale*, No. 85 0771R (N.M.C.M.R. January 6, 1989), is reprinted as Appendix E.

The June 16, 1987 order setting aside the December 30, 1985 decision of the N.M.C.M.R., and remanding the case for reconsideration, *United States v. Martindale*, 24 M.J. 405 (C.M.A. 1987) (summary disposition), is reprinted as Appendix F.

The December 30, 1985 decision of the N.M.C.M.R., *United States v. Martindale*, No. 85-0771 (N.M.C.M.R. Dec. 30, 1985), is reprinted as Appendix G.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 16, 1994. Title 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

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[2] The Navy-Marine Corps Court of Military review has been renamed the Navy-Marine Corps Court of Criminal Appeals. All cases relevant to this petition were decided before the name change, so the original name of the court is used in this petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

STATEMENT OF THE CASE[3]

While attending a meeting of Overeaters Anonymous, petitioner told his counselor that he had sexually abused his 12 year old son. Petitioner subsequently gave a confession to agents of the Naval Investigative Service [hereinafter N.I.S.], the criminal investigative agency of the U.S. Navy.

As a result of petitioner's statements, petitioner's son, Sean, was interviewed for two hours by N.I.S. agents, who tape recorded the interview. A transcript of the tape recorded interview was prepared. This transcript was the only evidence which corroborated petitioner's confession.

The government offered the transcript into evidence at trial. The defense objected. An evidentiary hearing was held, and Sean testified. Sean stated that he did not remember any of the alleged incidents with his father and

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[3] This statement of the case is drawn from *United States v. Martindale*, 36 M.J. 870 (N.M.C.M.R. 1993), *citing United States v. Martindale*, 30 M.J. 172 (C.M.A. 1990), *vacated, United States v. Martindale*, 32 M.J. 33 (C.M.A. 1990) (summary disposition).

that he was not sure what he had told the N.I.S. Agents during the interview. He also testified that he "just made up things" during the interview, and that "it's a lie - what they said."

At the end of the evidentiary hearing, the government sought to have Sean declared unavailable and offered his statement to the N.I.S. agents under the residual hearsay exception of Military Rule of Evidence [hereinafter Mil. R. Evid.] 804(b)(5).[4] The defense requested that the declarant be declared available, that the government be required to call the declarant on the merits, and that the hearsay statement be suppressed as unreliable.

The military judge found that Sean was unavailable as a witness due to his failed memory and a perceived refusal to testify. The military judge ruled that Sean's recorded interview was admissible under either of the residual hearsay provisions of the Military Rules of Evidence; 803(24) or 804(b)(5). The trial judge did not state which guarantees of trustworthiness he found that made this evidence admissible as residual hearsay.

The judge, after declaring the declarant unavailable for hearsay purposes, then stated that the declarant was available for confrontation purposes. The judge stated that if the defendant wished to cross-examine the declarant the court would require the government to call the declarant, and although the government would not ask the declarant any questions the petitioner's right to cross-examine the

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[4] References to the rules of evidence in this petition are to the Military Rules of Evidence. All of the Military Rules of Evidence relevant to petitioner's case, however, are identical to the corresponding Federal Rules of Evidence, as they are required to be absent specific action by the President. *See* Article 36, Uniform Code of Military Justice, Manual for Courts-Martial, 1984 [hereinafter U.C.M.J.], 10 U.S.C. § 836. Therefore, the issue presented in this petition is also applicable to federal civilian practice.

declarant would not be limited in any way. The defense did not elect to cross-examine Sean. Petitioner's confession was also admitted into evidence.

Petitioner, contrary to his pleas, was found guilty of one specification of attempted sodomy in violation of Article 80, U.C.M.J., 10 U.S.C. § 880, one specification of committing an indecent act with a minor in violation of Article 134, U.C.M.J., 10 U.S.C. § 934, and thirteen specifications of sodomy in violation of Article 125, U.C.M.J., 10 U.S.C. § 925. The only evidence against petitioner was the transcript of Sean's interview and petitioner's confession.

Petitioner was sentenced to five years of confinement, a dishonorable discharge, and reduction to pay grade E-1.

REASONS FOR GRANTING THE WRIT

A WITNESS CANNOT BE UNAVAILABLE FOR HEARSAY PURPOSES, BUT AVAILABLE FOR CONFRONTATION PURPOSES.

The court below found that Sean, the only witness against petitioner, was unavailable for hearsay purposes but available for confrontation. In doing so, the court ignored the plain meaning of both the rules of evidence and the Sixth Amendment. The holding violated petitioner's Sixth Amendment right to confrontation, and his Fifth Amendment right to due process. The holding has redefined the meaning of availability in such a way that a defendant can now be convicted based on what would otherwise be inadmissible hearsay, without ever having a meaningful opportunity to face the witnesses against him.

The court below affirmed the trial court's ruling that because Sean either did not remember the events in

question, or was unwilling to testify as to those events, he was unavailable within the meaning of Mil. R. Evid. 804(a)(2) and 804(a)(3). Appendix A [hereinafter *Martindale II*] at 2a (*citing United States v. Martindale*, 36 M.J. 870, 880-81 (N.M.C.M.R. 1993) [hereinafter *Martindale I*]). For the same reasons the court agreed that the hearsay statement to N.I.S. was the most probative evidence available, and was admissible under Mil. R. Evid. 804(b)(5). *Martindale II* at 3a (*citing United States v. McGrath*, 39 M.J. 158, 166-67 (C.M.A. 1994), *cert. denied* 63 U.S.L.W. 3340 (U.S. October 31, 1994) (No. 94-190); *Martindale I* at 880-81). Additionally, the court ruled that because Sean was physically present at trial and subject to cross-examination, petitioner was provided with confrontation. *Id.* at 3a (*citing Martindale I* at 875). Finally, the court held that because Sean was available for cross-examination, the statement did not itself have to be sufficiently reliable to satisfy confrontation, so *Idaho v. Wright*, 487 U.S. 805, 814-15 (1990), did not apply.[5] *Id.* at 2a (*citing McGrath*, 39 M.J. at 163-67;3 *Martindale I* at 873-81).[6]

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[5] The court took pains to find that *Wright* did not apply, because had it applied, the statement would have been inadmissible. *See Martindale II* at 4a-5a (Wiss, J., dissenting); *Martindale I* at 881 (four of eight factors court looked to to find statement admissible violated *Wright*); *Martindale*, 30 M.J. 176 (Everett, C.J., dissenting).

[6] The court also seemed to believe that the statement would have been admissible under Mil. R. Evid. 803(24). This was a mistaken belief based on the fact that for most purposes Mil. R. Evid. 803(24) and Mil. R. Evid. 804(b)(5) are identical. The mistake was that while both residual exceptions apply the same test for admissibility, under Mil. R. Evid. 803(24) the declarant could be available, so the hearsay must be more probative than testimony which an available witness could provide. If Sean had been available to testify, however, the hearsay statement most

The lower court's holding is based on this Court's precedents stating that a different inquiry into the admissibility of a hearsay statement applies when hearsay must also satisfy confrontation. *Ohio V. Roberts*, 448 U.S. 56 (1980); *Idaho v. Wright*, 497 U.S. 805 (1990). The court below took this Court's holdings regarding confrontation and hearsay one step further, and ruled that the inquiry into the availability of a witness can also vary depending on whether the availability is for hearsay or confrontation. *Martindale II*, 2a-3a (*citing McGrath*, 39 M.J. at 161-67; *Martindale I* at 873-81 (both cases holding that a witness can be unavailable for hearsay purposes and available for confrontation)). The court held that Sean was unavailable for hearsay purposes, but available for confrontation. *Id.* Petitioner, however, does not believe that this Court intended its cases to mean that a witness can be unavailable and available simultaneously. Such an application, as petitioner's own case demonstrates, permits an analysis which denies a defendant basic constitutional rights, and circumvents the rules of evidence.

I. The confrontation problem: direct examination.

This Court has stated that "[t]he Confrontation Clause provides two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion). Indeed, this Court wrote almost 100 years ago that:

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likely would not have been the most probative evidence available, rather the live testimony would have been. It was only because Sean was unavailable under Mil. R. Evid. 804 that the hearsay became the most probative evidence available.

> The primary object of [the Sixth Amendment] was. . . a personal examination . . . of the witness, in which the accused has an opportunity . . . of compelling him to stand face to face with the jury in order that they may look at him, and judge by . . . the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243 (1895). The plain meaning of the Confrontation Clause is the right of a defendant to confront face-to-face the witnesses against him. *California v. Green*, 399 U.S. 149, 155 (1970) ("Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."); *Coy v. Iowa*, 487 U.S. 1011, 1021 (1988) ("The irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.'" (citation omitted)).

In a case with an unavailable declarant, the defendant will never have the opportunity for face-to-face confrontation with the witness against him. Indeed, it is impossible to confront that witness face-to-face, because the plain meaning of a witness being unavailable is that the witness does not testify. By definition, that witness cannot testify. That is why the witness is unavailable. A non-testifying witness cannot possibly provide confrontation, because there can be no confrontation with a witness who does not testify. It is contrary to the plain meaning of both the Sixth Amendment and the rules of evidence for a court to conclude that a witness can be unavailable to testify but still provide a defendant with confrontation.

Petitioner's case illustrates this lack of confrontation. In the view of the lower court, the only

testimony Sean could have given, either on direct or cross examination, was that he did not remember the incidents that petitioner was charged with, and that he did not remember the interview with N.I.S. *Martindale II at 874-75.* In short, had Sean taken the stand at any time on the merits, he would simply have proven that he was unavailable. Testifying as to this lack of memory would not have made Sean a witness against petitioner. *See White v. Illinois*, 112 S.Ct. 736, 745 (1992) ("As applied in the Sixth Amendment context of a prosection, the noun 'witness' . . . [means] 'one who gives testimony,' *i.e.* '[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court.'" (citation omitted) (Thomas, J., and Scalia, J., concurring in part and concurring in the judgement)). The fact that Sean could not or would not remember the events in question was not what convicted petitioner. Petitioner was convicted based on what Sean had allegedly remembered when he spoke to N.I.S, rather than on what he did not remember at trial. *Martindale I* at 873 (*citing United States v. Martindale*, 30 M.J. 172, 173 (C.M.A. 1990), *vacated United States v. Martindale*, 32 M.J. 33 (C.M.A. 1990) (summary disposition)). Thus, for the very reason that Sean was found to be unavailable, such testimony as he could have given would not have provided petitioner with face-to-face confrontation.

The only way petitioner could have been afforded actual face-to-face confrontation at trial was for Sean to testify about the incidents in question, or at least about the hearsay statement. Had Sean remembered the alleged incidents, and testified to them, then there would have been confrontation. Had he not remembered the incidents, but remembered and adopted the hearsay statement, then perhaps there would have been confrontation. *See United*

States v. Owens, 484 U.S. 554 (1988) (admission of non-hearsay statement of witness identifying attacker, and testimony of same witness, who no longer remembered identity of attacker but remembered identifying attacker previously, satisfied confrontation). Since Sean neither remembered the incidents, nor remembered the hearsay statement, there could never be confrontation.

II. The confrontation problem: cross-examination.

Further, it is doubtful that an unavailable witness can satisfy a defendant's right to cross-examination. There is no opportunity for effective cross-examination of a witness who is unavailable because he cannot or will not remember the events in question. Again, unlike in *Owens*, where the witness in effect adopted the statement (and where the statement was not hearsay to begin with), in petitioner's case cross-examination on the contents of the statement was impossible. The witness simply could not or would not remember either the events alleged in the statement or the making of the statement itself. Thus, the only cross-examination available to petitioner would have been the exact statements which rendered the witness unavailable: "I don't remember." It is unreasonable to believe that cross-examination of an unavailable declarant, which results in statements which define the declarant's unavailability, is in fact cross-examination.

If cross-examination of a declarant who is unavailable due to lack of memory satisfies confrontation, then the mere opportunity to cross-examine an insane declarant would also satisfy confrontation. Under Mil. R. Evid. 804(a)(4), such a declarant would be unavailable for hearsay purposes, and a hearsay statement of that witness would be admissible under Mil. R. Evid. 804(b)(5). In such a case, the declarant would be physically present, and able to answer questions, but the answers would make no

sense. Based on the lower court's logic in petitioner's case, despite the fact that the witness is unavailable because he is insane, that very same insane witness is available for confrontation purposes. Further, because the insane witness can and will answer questions, the defendant's right to confrontation has been satisfied -- the right is for the opportunity of effective cross-examination, not effective cross-examination.

The opportunity to cross-examine an insane declarant, however, or one who is unavailable for another reason, does not satisfy confrontation. A decision that the opportunity to cross-examine an unavailable declarant satisfies the Sixth Amendment is a decision that places form over substance. It is a decision that creates a system in which a meaningless opportunity has swallowed up the intent of the constitutional right. Such a system has "effectively . . . emasculate[d] the right [to] confrontation itself." *See United States v. Fensterer*, 474 U.S. 15, 19 (1985) (*per curiam*). Such a system has now been created by the lower court.

III. The due process problem: shifting the burden.

Additionally, a system which finds that confrontation has been satisfied by the opportunity to cross-examine an unavailable witness also denies a defendant due process. It is a fundamental principle of our criminal justice system that the defendant need do nothing, because the government has the burden of proving him guilty, rather than the defendant having the burden of proving his innocence. The lower court, however, in ruling that the opportunity to cross-examine an unavailable witness on a hearsay statement satisfied confrontation, ignored that basic principle. Even assuming that such an opportunity does satisfy confrontation, a defendant must first know what the declarant's position is on that

statement. *See e.g. Douglas v. United States*, 380 U.S. 414, 420 (1965) ("[e]ffective confrontation of [a hearsay declarant] was possible only if [the declarant first] affirmed the statement as his.").

As in any case, there must first be direct testimony before there can be cross-examination. *See White*, 112 S.Ct. at 745 (Thomas, J., and Scalia, J., concurring in part and concurring in the judgement). The defendant must know whether the witness is now saying, at trial, that the events alleged in the statement are true, before he can conduct cross-examination. If the witness adopts the statement, then the contents of the statement have become evidence. *See Owens*, 484 U.S. at 554. But it is only the government, not the defendant, that wants the contents of the statement to be evidence. In creating the system which it did, the lower court placed on a defendant the burden of asking the government's questions for it, as well as asking cross-examination questions for himself.

If the witness denies the statement, then the statement was not admissible in the first place, because then it was simply an inadmissible prior inconsistent statement. If the witness refuses to answer questions, or claims a lack of memory, then there is still no testimony on which to conduct cross-examination. Regardless of how the declarant testifies, the defendant will still have been required to conduct the direct examination for the government. This is an impermissible shifting of the burden. It requires a criminal defendant to take actions which the government would normally be responsible for; the direct examination of a government witness, before that defendant can exercise his constitutional right; the cross-examination of a government witness. *See e.g. United States v. Inadi*, 475 U.S. 387, 408-09 (1986) (Marshall, J., and Brennan, J., dissenting).

IV. The due process problem: equal access to witnesses.

Finally, the decision of the court below also violated petitioner's right to due process because it denied him equal access to the witness. The declarant was found unavailable to the government for hearsay purposes, so the government was allowed to use the hearsay statement. *Martindale I* at 877, 881. The declarant was found available to the defendant for cross-examination, so the hearsay statement in question was found to be admissible, despite the fact that it did not satisfy confrontation. *Martindale II* at 2a-3a. One of the reasons that a defendant is entitled to cross-examination, however, is the possibility that the witness may testify favorably for the defendant, or at least the possibility that the witness' testimony on cross-examination will lessen the impact of the testimony on direct. Thus, the court below ruled that Sean was unavailable to give testimony for the government, but available to give testimony for the defendant.

The problem with this holding is that both parties are entitled to equal access to witnesses and evidence. A situation should not arise were one party has access to testimony of a witness, and the other does not. *Inadi*, 475 U.S. at 408-09 (1986) (Marshall, J., and Brennan, J., dissenting). Usually, making a witness available for a defendant but unavailable for the government, while it would deny a defendant equal access, might not violate due process. In petitioner's case it did violate due process, because the evidence which petitioner had available to him was functionally meaningless. It was simply Sean's testimony that he did not remember the events in question. The government, on the other hand, by being "denied" access to Sean's in-court testimony, was in reality provided access to his hearsay statement, which it would not otherwise have had access to. Thus, by providing unequal

access to the two parties, the court below denied petitioner due process.

V. Waiver.

The lower court erred in finding that petitioner waived his right to confrontation by choosing not to cross-examine the unavailable declarant, *Martindale II* at 3a, for the same reasons that it erred in finding that a witness unavailable for hearsay purposes was available for confrontation. Before the opportunity to cross-examine even arose, petitioner had been denied his right to face-to-face confrontation. Further, the opportunity to cross-examine an unavailable declarant was a meaningless opportunity. Finally, in order to cross-examine the declarant, petitioner would first have had to conduct direct examination. The job of conducting direct examination of a government witness is not the defendant's burden, and cannot be imposed prior to a defendant's right to conduct cross-examination. Petitioner waived nothing when he chose not to cross-examine Sean.

Had the hearsay statement satisfied one of the enumerated exceptions to the hearsay rules, or if it had been admissible under a residual exception, then the right to confrontation would have been satisfied in petitioner's case. Mil. R. Evid. 803; Mil. R. Evid. 804; *Wright*, 487 U.S. at 821. The hearsay statement in question, however, was not admissible under an enumerated exception, and it did not possess sufficient indicia of reliability by virtue of its inherent trustworthiness to satisfy confrontation, so it was not admissible under a residual exception.

The only way that the government was going to be allowed to use the hearsay statement was if that statement was found to be admissible despite its lack of sufficient indicia of reliability. In order to find it admissible, the lower court was forced to violate the plain meaning of the

rules of evidence and the Sixth Amendment, violate petitioner's right to confrontation and due process, and circumvent the application of the rules of evidence. In making the hearsay statement in petitioner's case admissible, the lower court has created a new procedure by which a defendant can be convicted without ever being provided with confrontation.

The opinion of the lower court cannot stand. The lower court found support for its approach to availability in this Court's precedent. Thus, it is important that this Court address the issue of whether a witness can be unavailable for hearsay purposes, but available for confrontation purposes.

A COURT SHOULD NOT CONSIDER CORROBORATING EVIDENCE IN DETERMINING THE RELIABILITY OF A HEARSAY STATEMENT UNDER A RESIDUAL EXCEPTION TO THE HEARSAY RULE WHEN CONFRONTATION IS NOT AT ISSUE.

Prior to *Wright* "[m]ost federal courts [had] looked to the existence of corroborating evidence or the lack thereof to determine the reliability of hearsay statements not coming within one of the traditional hearsay exceptions." *Wright*, 497 U.S. at 829 (Kennedy, J., dissenting).

Wright established that when a party seeks to introduce a statement under a residual exception to the hearsay rule, constitutional concerns require the reliability of the hearsay statement to be determined solely by the circumstances surrounding the making of the statement. *Id.* at 822. The question remains, however, whether the *Wright* test for determining hearsay reliability is applicable when a

Confrontation Clause question does not exist.

The United States Court of Military Appeals and the United States Court of Appeals for the Ninth Circuit have both stated that once confrontation has been satisfied the test for reliability will not be limited to the circumstances surrounding the making of the hearsay statement, and reliability can be determined by the use of corroborating evidence. *See McGrath*, 39 M.J. at 165-66; *United States v. Valdez-Soto*, 31 F.3d 1467 (9th Cir. 1994).

The Ninth Circuit in *Valdez-Soto* found:

> In the absence of concerns about the accused's right to confrontation, the trial judge has a fair degree of latitude in deciding whether to admit statements under Fed.R.Evid. 803(24) . . . we've recognized that corroborating evidence is a valid consideration in determining the trustworthiness of out-of-court statements for purposes of Rule 803(24).

Valdez-Soto, 31 F.3d at 1471.

The decisions of the United States Court of Military Appeals and the United States Court of Appeals for the Ninth Circuit are contrary to decisions of the United States Court of Appeals for the Seventh Circuit in *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979) (corroborating evidence is not relevant to the admissibility of a statement under a residual exception to the hearsay rule); *Doe v. United States,* 976 F.2d 1071 (7th Cir. 1992) (the court applies a *Wright* analysis in a civil case in which the Confrontation Clause is not applicable); and this Court's decision in *Wright*. This Court in *Wright* quoted *Huff* for the proposition that "[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to

the hearsay rule are based are those that existed at the time the statement was made and do not include those that may have been added by those using hindsight." *Wright*, 497 U.S. at 820.

By quoting *Huff*, the question was left open whether this Court intended to limit the consideration of indicia of reliability to the circumstances surrounding the making of the statement, regardless of whether the Confrontation Clause is at issue.

The dissent in *Valdez-Soto* did reason that this Court indicated, in the absence of a Confrontation Clause issue, that hearsay should not be admitted on the basis of corroboration. *Valdez-Soto*, 31 F.3d at 1476 (Zilly, J., dissenting). The dissent in *Valdez-Soto* found additional authority for prohibiting the use of corroborating evidence from the legislative history of the Senate Judiciary Committee when the committee reported:

> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action.

Id. at 1477 (citation omitted).

In the present case, the lower courts relied upon corroborating evidence to determine the reliability of the

hearsay statement. The use of corroborating evidence in this matter was erroneous and requires reversal of petitioner's conviction.

In addition to the language in *Wright*, the reasoning behind the rules of hearsay also suggest that corroborating evidence should not be considered. Military Rules of Evidence 803(1)-(23) and 804(b)(1)-(4) all determine reliability by examining the circumstances surrounding the making of the statement. Looking to the circumstances surrounding the making of the statement is the analysis by which we have received the enumerated exceptions to the hearsay rule. *Wright*, 497 U.S. at 820 (discussing some of the enumerated exceptions and describing the basis for their reliability); *McGrath,* 39 M.J. at 172 (Wiss, J., dissenting) (exceptions under 804(b)(1)-(4) and 803(1)-(23) in every instance base reliability on some type of circumstance surrounding the making of the statement).

Therefore, the wording of Mil .R. Evid. 803(24) and 804(b)(5) indicates that statements considered under it should meet the same requirements establishing the other exceptions to the hearsay rule, even when the Confrontation Clause is not at issue. The plain meaning of 803(24) and 804(b)(5) dictates that statements offered under these rules should at a minimum contain reliability that is equivalent to the enumerated exceptions. When a hearsay statement is sought to be admitted pursuant to a residual exception the courts should not have to lower the standards of reliability to find admissibility.

Further, a number of the enumerated exceptions have been labeled as "firmly rooted" exceptions. This Court has recognized that statements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability. *Wright* 497 U.S. at 821. In determining the reliability for a non-firmly rooted exception under 803(24) or 804(b)(5),

the statement should be subjected to the same scrutiny as the firmly rooted exceptions. Mil. R. Evid. 803(24) and 804(b)(5) specifically provide that for a statement to be admitted under this exception it must have "equivalent circumstantial guarantees of trustworthiness."

Concerning trustworthiness this Court stated in *Wright* that:

> Because evidence possessing "particularized guarantees of trustworthiness" must be at least as reliable as evidence admitted under a firmly rooted exception we think that evidence admitted under the former requirement must similarly be so trustworthy that the adversarial testing would add little to its reliability.

Id. at 821 (citation omitted). Our judicial system views with such disfavor the use of hearsay evidence that it is specifically prohibited by Mil. R. Evid. 802. Mil. R. Evid. 803 and 804 provide exceptions to this prohibition in certain instances that guarantee reliability and trustworthiness.

Thus, not only should the residual hearsay exceptions possess equivalent guarantees of reliability and trustworthiness as those found in the other enumerated exceptions, they should possess the equivalent guarantees of reliability and trustworthiness as those found in the firmly rooted exceptions. The vehicle by which this protection should be provided is to look to the circumstances surrounding the making of the statement and not by bootstrapping reliability to some other extrinsic evidence.

The court below lowered the standard of admissibility to bootstrap in an otherwise unreliable statement. The use

of corroborating evidence was the **only** means by which the lower court could establish reliability. When petitioner's case first appeared before the United States Court of Military Appeals the court found reliability from the "entire record," while Chief Judge Everett in his dissenting opinion stated, "I find the circumstances surrounding the statement to be quite the contrary." *Martindale*, 30 M.J. at 176 (Everett, C.J., dissenting). Chief Judge Everett analyzed the circumstances surrounding the making of the statement in depth, and rightly concluded that the statement was unreliable. *Id.* Bootstrapping corroborating evidence, as the courts below have consistently had to do to justify finding the statement admissible, does not in reality alter the reliability of the statement. *See Wright*, 497 U.S. at 823-24.

When looking at the facts that surround the making of the hearsay statement in this case it becomes quite obvious that the statement does not contain "particularized guarantees of trustworthiness," "circumstantial guarantees of trustworthiness," or any shred of reliability. In fact, the circumstances surrounding the making of this statement are more suspect and less reliable than the circumstances surrounding the statement in *Wright*. Consequently, corroborating evidence should not be considered even when the right to confrontation is not at issue.

CONCLUSION

The lower court has developed an analysis of unavailability which has resulted in a twisting of the rules of evidence, and a trial procedure that violates the Constitution. Further, the court has greatly expanded the class of admissible hearsay statements, to now include statements which do not contain indicia of reliability equivalent to statements admitted under an enumerated

exception. This Court should address the question of whether either of these procedures is permissible.

Respectfully submitted,

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